



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Debra Figone  
City Manager

Rick Doyle  
City Attorney

**SUBJECT:** AMENDMENTS TO  
PUBLIC ENTERTAINMENT  
PROVISIONS OF TITLE 6  
AND TITLE 20

**DATE:** January 14, 2010

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## **RECOMMENDATION**

It is recommended that the City Council:

- a) Adopt an urgency ordinance amending Chapter 6.60 of Title 6 of the San Jose Municipal Code to amend the definition of Public Entertainment to limit the application of the ordinance to venues with occupancy greater than 100, limit the discretion of the Chief of Police in approving applications for permits and licenses, limit the discretion of the Chief of Police in setting conditions on permits and licenses, specify time lines by when an application for a permit or license must be acted upon, clarify various provisions to ensure consistency throughout the Code, and setting forth the facts constituting such urgency.
- b) Adopt an urgency ordinance amending Chapters 20.40, 20.70 and 20.200 of Title 20 of the San Jose Municipal Code to eliminate the entertainment establishment use from the City's Zoning Code and setting forth the facts constituting the urgency.
- c) Adopt a resolution initiating amendments to Chapters 20.40, 20.70 and 20.200 of Title 20 of the San Jose Municipal Code to eliminate the entertainment establishment use from the City's Zoning Code, referring said ordinance to the Planning Commission for its report and recommendation, and setting a public hearing on the ordinance.
- d) Direct the City Manager and City Attorney to continue their work to seek further input of stakeholders on the structure of the entertainment permit system and other alternatives which would serve the goals of providing a safe environment for patrons and residents while promoting a vibrant nightlife environment for the City.

## **OUTCOME**

Approval of these recommendations will result in changes to the "Public Entertainment Permit" ordinance and the Zoning Code that together will expedite the permitting process for public entertainment businesses, limit the discretion vested in the Chief of Police regarding both the issuance of public entertainment permits and the provisions of those permits, and set a time certain by which the Chief of Police must act on applications for such permits; all, to increase public convenience while ensuring compliance with the law.

Furthermore, approval of these recommendations will result in direction to staff to continue to work with the public entertainment business community to explore further revisions to the Public Entertainment Permit ordinance aimed at providing a vibrant nightlife for those living in, working in and visiting the City of San Jose and maintaining their health, safety and welfare.

## **BACKGROUND**

Title 6 of San Jose Municipal Code ("Code") governs police-issued regulatory permits for various businesses operating in the City, including, among others: massage, taxicabs, public entertainment, peddlers and towing. Chapter 6.60 of Title 6, entitled "Public Entertainment Permit," is an ordinance that applies to businesses that are open to the public, where alcohol is sold on the premises and entertainment is provided or allowed. The Public Entertainment Permit ordinance ("Entertainment Ordinance") was adopted by the City Council in 1995. The goal of the Entertainment Ordinance was to provide the City with a tool that would assist the City in protecting the health, safety, and welfare of those persons working, living and playing in the City.

The Entertainment Ordinance requires a business to obtain a Public Entertainment Business Permit ("Permit") from the Chief of Police if that business is open to the public, selling alcohol on the premises and providing or allowing one or more of the following activities at the premises:

1. Dancing;
2. Singing;
3. Audience participation in the entertainment; or
4. Live entertainment

Together, the Entertainment Ordinance and the required Permit include provisions which regulate public entertainment businesses in the City, requiring them to operate in a manner consistent with maintaining the public health, safety, and welfare. Among other things, public entertainment businesses are required to do the following:

1. Ensure that they do not conduct their business in a manner that creates or results in a public nuisance (i.e., disturbances of the peace, illegal drug activity, public drunkenness,

illegal gambling, prostitution, acts of violence, public urination, acts of vandalism, lewd conduct, loitering, etc.);

2. Have an adequate number of security personnel on staff to deal with problem patrons;
3. Ensure that the security personnel does not consume illegal substances or alcoholic beverages while on duty;
4. Ensure that if the security personnel are armed while on duty, they are identified to the Police Department;
5. Ensure that they are not serving obviously intoxicated individuals;
6. Comply with specific noise restrictions;
7. Queue waiting lines so as not to interfere with the public's right of way;
8. Refuse the admission of persons under twenty-one (21) years of age;
9. Comply with occupancy restrictions set by the Fire Marshal;
10. Hire only event promoters that are permitted by the City or agree to legally accept all responsibility for events promoted by those event promoters; and
11. Immediately communicate with the Police and Fire Departments when there is an imminent threat to public safety.

San Jose is not unique in this respect. Almost all cities in the country have specific laws/regulations that govern public entertainment businesses. The major difference from City to City is the definition of an entertainment business. Regulation of the operations of entertainment businesses has been a useful tool for cities as well as the entertainment industry by providing minimum expectations to ensure the safety of the public.

### **ANALYSIS**

It has recently come to the attention of the City Manager and the City Attorney that certain provisions of the Code dealing with public entertainment businesses and public entertainment uses could be subject to legal challenge. Specifically, with regard to the Entertainment Ordinance, in order to avoid any appearance of favoritism of one business over the other, changes should be made to limit the discretion of the Chief of Police in granting or denying a Permit and in setting forth provisions within that Permit, and set a time certain by which the Chief of Police must act upon an application for a Permit.

Based on the concerns outlined above, staff is seeking the immediate approval from Council for the following changes:

#### ***Title 6 - Entertainment Ordinance***

##### ***Process and Timeline***

Currently, the Code provides that an application for a Permit must be approved or denied within a "reasonable" time period. Because "reasonable" may have different meanings for different individuals, it is suggested that a specific time period of 45 days be added to the Entertainment Ordinance. This will clarify the time for the Police Department to process an application for a

Permit. Currently, the Police Department uses the state's Department of Justice ("DOJ") to conduct criminal background checks. Depending on the DOJ workload and an applicant's criminal history, this process could potentially take longer than 45 days. In cases where the Police Department does not receive a response from the DOJ within the 45-day period but has no other reason to deny the application for a Permit, the Chief of Police will issue a Permit. If after issuance of the Permit, the Police Department receives a background report from the DOJ showing the applicant had a criminal history that includes a conviction of a crime that would have been the basis for a denial when he applied for the Permit, the Chief of Police will revoke the Permit based on the conviction and on the applicant's failure to provide accurate information regarding his criminal history on his application.

#### *Decision Maker Discretion*

In addition, the Code requires persons applying for a Permit to submit any information the Chief of Police may deem necessary for the proper investigation and back grounding of an applicant. The City is unaware of any complaint of improper use of discretion; nevertheless staff is recommending language that clearly identifies what an applicant for a Permit must submit to the Chief of Police. Staff is further proposing the elimination of language allowing the Chief of Police to request any information he deems necessary, which will limit discretion in the Chief of Police's role as the initial decision-maker regarding applications for these Permits.

Further, the Code currently provides that an application for a Permit "may" be denied for a list of objective factors. The City is unaware of any claim that the Chief of Police has impermissibly exercised this discretion to favor one form of entertainment over another, but the concern is that the Chief of Police *may* permit some businesses while denying others. The proposed amendments to Chapter 6.60 will limit the discretion of the Chief of Police to require the denial of an application for a Permit when certain limiting factors are present. For example, if in the last ten (10) years, an applicant has been convicted of a felony involving, among other things: violence, fraud, money laundering, pimping or pandering, his application for a Permit must be denied. If none of the factors being proposed in the urgency ordinance exist, the application for a Permit must be granted.

#### *Permit Provisions*

Currently, the Code provides that persons operating public entertainment venues must comply with any standards for security set by the Chief of Police in the Permit. Again, the City is unaware of any complaint of improper use of discretion by the Chief of Police in setting those standards; nevertheless, staff is recommending language that clearly identifies what security provisions must be complied with; including, but not limited to, the number of security personnel required to be present at the public entertainment premises, the manner in which security personnel identifies itself, the state license all security personnel is required to obtain, the minimum duties required by the security personnel to ensure the public health, safety and welfare and the duty to notify the Chief of Police if the security personnel will be armed. Further, staff recommends amending the Code to provide that the number of security personnel

required to be present at a premises while the public entertainment business is operating can be increased by the Chief of Police only when it is necessary to protect the public health, safety and welfare.

### *Occupancy of Venue*

Currently, the occupancy of a public entertainment business is not used to determine whether the person operating the business needs to obtain a Permit. Staff is proposing to limit the scope of the Entertainment Ordinance to larger facilities which result in increased police activities. Data from the Police Department indicates that there are various occupancy levels that lend to higher crime statistics. Based on the Police Department's data, staff believes businesses offering public entertainment, serving alcoholic beverages and having a maximum occupant load of 100 persons or less do not have the same level of complex problems that need to be regulated and consequently do not generate the same level of calls for service as those venues with the same factors in place and a maximum occupant load of more than 100 persons. As such, staff is recommending that the Entertainment Ordinance be amended so that it does not apply to venues with maximum occupancies of 100 persons or less.

### *Title 20 – Zoning Code*

The provisions of Title 20 address the regulation of *land use* concerns and appropriate locations for activities. Upon a detailed review and examination of the issues and City regulations pertaining to entertainment establishments as described above, staff has identified that the public interest is adequately served by the review and permitting procedures for entertainment establishments set forth in Title 6 of the Code as explained in previous sections of this memorandum. The land use issues related to entertainment establishments can be addressed through existing development permit requirements for alcoholic beverage drinking establishments, noise regulations, and after-midnight use regulations. Since conditional use permits already are required to operate past midnight or for drinking establishments, staff has identified no reason or need to separately regulate (from a land use perspective) only the entertainment at those businesses. In addition, preliminary discussions with stakeholders have indicated the City's overlap of regulations between Title 6 (Public Entertainment Permit) & 20 (Conditional Use Permit) are duplicative and often confusing since both attempt to regulate the same thing.

For these reasons, staff sees an opportunity to streamline City review and processing of entertainment establishment issues by consolidating them within the provisions of Title 6 of the Code as described in this memorandum and recommends deleting the entertainment use category from the City's Zoning Code.

### *Current Workplan & Future Goals:*

The above changes strictly deal with constitutional issues that arise in the near term. If approved, staff will continue their work with stakeholders throughout the City to bring forward

further revisions to the Entertainment Ordinance that serve the goals of providing a safe environment for patrons and residents while promoting a vibrant nightlife environment for the City. The current staff workplan includes:

1. Best Practices Research & Analysis
2. Stakeholder Meetings
3. Citywide Input
4. Broad Agreement

The City and stakeholders are currently working together on a number of issues, including:

- What areas of the operations should be regulated
- The process to obtain a Public Entertainment Permit
- Who needs to be regulated under the Entertainment Ordinance

City staff plans to finish the outreach process in March and bring forward further revisions thereafter.

### **EVALUATION AND FOLLOW-UP**

If the above recommendations are approved, staff will return to Council will further revisions to Title 6 and Title 20 based on further research and stakeholder input.

### **POLICY ALTERNATIVES**

#### *Alternative 1: No Changes*

**Pros:** Maintaining existing processes would be familiar to applicants of a Public Entertainment Permit.

**Cons:** Not addressing potential legal concerns could jeopardize the Public Entertainment Permit ordinance and the requirements that are outlined in a Public Entertainment Permit.

**Reason for not recommending:** The requirements of the Public Entertainment Permit ordinance and the Public Entertainment Permit provide important safeguards, such as security requirements, to ensure that businesses are operating in a manner that will protect the public health, safety and welfare. It is important that the City ensure that its ordinance is not subject to legal challenge, which if successful could jeopardize the City's ability to expeditiously enforce these important safeguards.

### **PUBLIC OUTREACH/INTEREST**



**Criterion 1: Requires Council action on the use of public funds equal to \$1 million or greater.**

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**(Required: Website Posting)**


- ☐ Criterion 2: Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- ☐ Criterion 3: Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

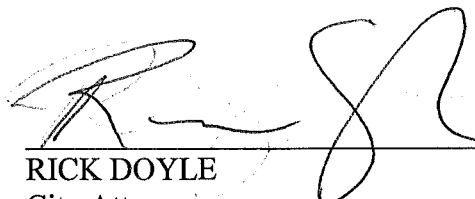
**COORDINATION**

This memorandum and related documents and resolutions were prepared in cooperation with the City Manager's Office, the Police Department, Planning, Building and Code Enforcement and the City Attorney's Office.

**CEQA**

Not a project.

  
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For questions, please contact Lee Wilcox, Downtown Coordinator, at (408) 535-8172, or Angelique Gaeta Nedrow, Deputy City Attorney, at (408) 535-1991.